United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-6072

To be argued by
WILLIAM R. KLEIN

In The

United States Court of Appeals

For The Second Circuit

B

P/S

In the Matter of WILLIAM ROBERT KLEIN a/k/a WILLIAM R. KLEIN,

An Attorney,

WILLIAM ROBERT KLEIN,

Appellant,

DAVID N. EDELSTEIN, Chief Judge, U.S.D.C.S.D. N.Y.,

Respondent.

BRIEF FOR APPELLANT

WILLIAM R. KLEIN
Pro se Appellant
118-21 Queens Boulevard
Forest Hills, New York 11575
(212) 268-6320

(9691)
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PRELIMINARY STATEMENT

This appeal is from a final order and Opinion # 43821 of the Chief Judge of the U. S. District Court for the Southern District of New York dated February 2, 1976, denying vacatur of his ex parte order of September 25, 1974, an automatic disbarment of appellant in said Court; and from denial of a further application of the appellant for a first formal hearing to be had upon attorney-applicant's enumerated challenges to the validity of the said order of the Chief Judge, as provided for under District Court Rule 5, by memorandum dated March 19, 1976.

The said ex parte order of the Chief Judge reads as solely predicated upon a final state court judgment of June 29, 1965, and which, his opinion concedes, was unconstitutional.

Application for its cancellation had been made promptly upon receipt of a certified copy of said order of September 25, 1974 on or about October 10, 1974, with presentation to the Chief Judge of alternative forms of an ex parte countermanding order and order to show cause, supported by affidavit. No issuance thereof, but "investigation", was pursued.

Only some 15 months later came a consent of the Chief Judge to an appearance of the applicant before him for whatever oral statement, applicant cared to make; and same was set for, and had, on January 16, 1976. The applicant was not invited or required to be sworn as to the numerous challenging facts recited by him, tending to undermine the constitutional and jurisdictional validity of the entire state-court disciplinary proceedings, both prior to, and subsequent to issuance of the original State Court judgment of June 29, 1965, and upon which the Chief Judge's order of disbarment was singly and solely read and predicated.

The Chief Judge handed down his denial order and Opinion # 43821 on February 2, 1976. Appellant at once noticed application for return before the Chief Judge for formal hearing on sworn testimony to be had under Rule 5(d) on all issues of fact, raised for the first time, by said Opinion, and in connection with applicant's supporting papers, already before the Chief Judge; and also on the four issuable aspects, by way of attorney's safeguards, provided in said Rule 5(d), made controlling on the Court and the Chief Judge therein. The Chief Judge filed his MEMORANDUM dated March, 19, 1976 treating the application as one for mere reargument, and denied it.

STATEMENT OF ISSUES

A. Whether the Chief Judge, in the presence of a nine-year old State Court judgment of disbarment - on its face lacking essential due-process recitals - should not have restrained, and withheld action thereon, except to issue promptly an order to show cause, for joinable issue, with service of an answer, under Rule 5d, - if not to question the source of delivery of said such judgment paper, and for taking of testimony under the four (4) specified grounds for challenge of the state proceedings, and the issues of fact raised thereby.

B. Whether the Chief Judge's ex parte disbarment order should not be vacated, being singly and solely predicated on said stale judgment, irrespective of all subsequent state court attempts to cure the basic defects of the said judgment, the principle of comity having no application here.

C. Whether the Chief Judge should not have felt precluded and bound by the United States Attorney's report to the coordinate Chief Judge of September 9, 1968, in the District Court of the Eastern District of New York, made upon latter's 1965 order to show cause and that

United States Attorney's 3-year investigation of the same subject state court judgment proceeding as had, both before and after its entry in 1965, followed by abandonment of any further prosecution thereon, especially since the Chief Judge concedes the unconstitutionality of the State Court judgment upon which his own disbarment order exclusively rests.

STATEMENT OF FACTS

Appellant is presently a member of the Bar of the United States District Court, Eastern District of New York, and of the District of Columbia.

This is an appeal from an ex parte, final order, of disbarment by the Chief Judge of the District Court of the Southern District, Hon. David N. Edelstein. It was made and entered by him on September 25, 1974 - all done, ostensibly, under that District Court's Rule 5. (p.1 Footnotes A-6).

Appellant (in 1974) at once applied (A-10-11-12-B) to the Chief Judge for the prompt cancellation of the said disbarment order on the basic grounds given:

(a) That said order was, as, on its face, appears, solely predicated on recital of an alleged state court (Appellate Division-2nd Department) judgment of disbarment, dated June 29, 1965;

(b) That the said state judgment, on its face, was, and is a nullity in law, for its failure and omission to contain the essential normal recitals of due process, in its procurement; i.e., the requisite process, procedures and proceedings to constitute it a valid constitutional judgment,-and such a judgment of disbarment, particularly,-as same are defined and prescribed by the State laws, to wit, Sec. 5011 of the Civil Practice Law and Rules, and by Sec. 90(6) of its Judiciary Law, governing attorneys' disciplinary cases;

(c) That said statutes prescribe for such validity, notice of charge, in advance, upon which any guilt may be predicated; a prior opportunity to make answer to the charge, and the holding of hearings by a court or referee, thereupon, all "BEFORE" issuance, by state court of, and entry by it, of any disciplinary judgment.

Appellant initially rested his demand for prompt cancellation, on the foregoing grounds, (A-2) assuming that his dignified representation of the record, and the relevant law would be sufficient with the Chief Judge, either to grant the instant relief of countermand, or to warrant setting the motion down for prompt hearing,taking evidence on stated issues, as

the Rule 5 pattern prescribes. (A-6 Footnote p) A hearing might then be had upon his issuance of an order to show cause, with possible Bar Association adversary intervention ordered, as Rule authorizes, and with respondent-attorney's answer thereto to follow, in joinder of issue.

Appellant called attention to the facts

(a) That said State Court judgment was originally a surprise abrupt mail-order, and already 9 years old, on its face, and the apparently undisclosed fact, promptly upon its issuance, the said state court had already in 1965 sought to obtain, in the District Court in the Eastern District of New York similarly, as now, a Federal disbarment order, in comity from its Chief Judge, under the same prevailing Court Rule 5 (A-10)

(b) That said Chief Judge, Hon. Joseph C. Zavatt, issuing his order to show cause (65M811) (A-10) directed the United States Attorney for the Eastern District of New York to make thorough investigation of respondent's same amazing claims as to the entire underlying state court proceedings, which had issued and sustained said judgment of disbarment, and to

report back to said Chief Judge his findings and recommendations. Said investigation was followed by a thorough history report dated September 9, 1968, now on file (65M811-EDNY).

Said report verified the facts and legal claims as contained in respondent's immediate 1965 Answer to said order to show cause, contained legal conclusions implemented by submission of authorities, and recommendations, on constitutional invalidity against prosecution.

The conclusions reached by the United States Attorney were: that the judgment as obtained did not comply with constitutional due process requirements of Section 90(6) of the State's Judiciary Law, in that notice of charge and opportunity for answer and hearing "BEFORE" disciplinary action were both lacking; and that all proceedings thereafter had in state courts, whether appellate or original, could be, and were no better than the basic unconstitutional judgment, until first corrected.

The Chief Judge's order to show cause of September 1, 1965 contained a usual interim suspension of respondent's right to practice pendente lite; and

upon respondent's motion to dismiss the Petition and Order to Show Cause, returnable September 10, 1968, and a full hearing had thereon, (and after the United States Attorney General John Mitchell intervened to make new broad policy for prosecutions of attorneys, to bar use of United States Attorneys for such prosecutions, in the future) the motion was granted without prejudice and respondent, was fully reinstated, with vacature of the interim order of suspension.

Meanwhile the appellant continued to challenge the first original order of disbarment, and all the proceedings had thereon, upon the bases, substantially as propounded by the United States Attorney's office (Eastern District of New York) when confronted by the ex parte order of the Southern District's Chief Judge in October, 1974.

Appellant applied to,and implored the Chief Judge for immediate hearing, if his submissions of fact and law were being questioned. The facts, amongst others, showed the retaliatory nature of the original state prosecution and proceedings in the Appellate Division of the Second Department, located in the Eastern District of New York, to explain the abruptness of the judgment's

issuance and entry by the State Court. (A-4)

To all applicant's submissions and implorings to Chambers of the Chief Judge for early and meaningful hearings, whereon formal issues could be aired under oath if needbe, applicant received uniform answer - the Chief Judge is "investigating." That went on from October, 1974 to January, 16, 1976, a total of some 16 months, with full disbarment thus in force. (A-11, 13) However, in apparent recognition by the Chief Judge of the unique ("sui generis") (A3 aff. p.1.) nature of applicant's position ( ) and claims, he, by communication dated November 4, 1974 (A-14) allowed, that applicant could submit an ex parte countermand order, with no need for usual adversary proceedings. (A-14). But that proposed order lay dormant in chambers until January 16, 1976. On that day, the Chief Judge merely listened to applicant, disclosed nothing of his 16 month "investigation." He offered no contradiction of this attorney, on either the facts or the law, or the state of the record as on file in any of the courts,-State Court or Federal, Eastern District of New York (File No. 65M811). The Chief Judge did, however, passingly indicate that he had

been making prejudicial private inquiry (A-4, A-23).

There followed the Chief Judge's opinion, (A-6), for the first time disclosing some selective reactions to the state court proceedings, omitting virtually all reference to that part of the history and evidence of retaliation at work, (1963-1970) and instead now evidencing his own expressions of personal confidence in the actions of the State Court. Repeatedly he resorted to presumption, where the evidence, if heard, would have squarely eliminated or precluded such presumption (A-6, p.5 Op.) (A-6 p.v. footnote Op.) (A-6, p.v. Footnote Op.)

Appellant was also surprised at the opinion's material omissions (A-7, p.6) and its going defensively beyond the 1965 judgment, the simple and sole predicate of the Chief Judge's disbarment order; appellant moved for a formal hearing of the evidence which led to the abrupt mail-order of June 29, 1965 and the retaliatory background against which the State Court made its noticeless and hearingless (pre-)judgment of disbarment of June 29, 1965.

Appellant's motion, on notice, followed, for hearings to be had on the four (a)(b)(c)(d) grounds designated in Rule 5(d); anyone, or all of which, established, could make the state court judgment, as such,

inoperative, or inapplicable to Federal Court discipline, or unacceptable to the Chief Judge.

That motion, again standing unopposed, was subject to further surprise treatment by the Chief Judge - His Memorandum held it to be a mere motion for "re-argument", when, in fact, it was for a first hearing to be had on sworn testimony, a truly adversary procedure to be had, for which appellant asked, that Bar Association, as provided by Rule 5, be appellant's adversary, instead of the Chief Judge. The Memorandum also dealt with appellant's submissions of recent United States Supreme Court authoritative cases. These authorities would bar the Chief Judge's rationale, in going beyond the admittedly unconstitutional judgment of June 29, 1965.

So, as matters finally stood, appellant was waiting for either cancellation of the Chief Judge's order, based on our unmet claim of the nullity nature of the State Court order of disbarment of June 29, 1965, or for formal hearings of the evidence proffered, to establish the four grounds.

POINT I

IT IS SIMPLIFYINGLY CONCEDED BY THE OPINION OF THE CHIEF JUDGE AT ITS OUTSET:

(a) THAT THE STATE COURT JUDGMENT OF DISCIPLINE DOES NOT BRING AUTOMATIC ADOPTION THEREOF BY THE U.S. DISTRICT COURT;

(b) THAT TWO FUNDAMENTAL CONSTITUTIONAL GUARANTIES OF NOTICE AND OPPORTUNITY TO BE HEARD, "BEFORE" DISCIPLINE, WERE VIOLATED, (AS ALSO REQUIRED BY BASIC STATE STATUTE (JUD.LAW, SECTION 90(6));

(c) THAT THOSE VIOLATIONS APPEAR INCORPORATED INTO AND UPON THE FACE OF THE STATE'S DISBARMENT JUDGMENT (p. 4, A-6); AND

(d) THAT "DISCLOSURE THEREOF WOULD PRECLUDE THIS COURT FROM FOLLOWING THE STATE DETERMINATION." (A-6, p.1)

It should be added that the Opinion omitted other presented due-process claims, undisputed, in constitutional violation. (A-4, p. 2§ , p.3). E.g., violation of the 14th Amendment's requirement of the equal application of the state laws.

Reference here is to the requirement, first imposed by the United States Supreme Court (Gompers v. Buck Stove, 221 US 408,440, then adopted by the New York Court of Appeals in Re: Del Bello, 19 NY(2) 446,473, and Re; Sarisohn, 21 N.Y.(2) 255, 263. That requirement is, that when a single judgment of collective punishment, covering a group of findings of guilt, is followed by appellate elimination of one or more of said findings, that judgment must be vacated, and a new hearing held, upon notice, for reassessment of punishment. (The elimination, by 1967, of 4½ findings of guilt, had thus ndered it obsolete, in any event.)

However, the Opinion, first agreeing with appellant that the issue is a "narrow" one, then veers away from its own terms of "preclusion" and inescapability, in the contrary presence of the clear language of Rule 5d,

> "...unless an examination of the record resulting in such discipline discloses (1) that the procedure was so far lacking..."

That "record" is, obviously, what preceded the judgment of discipline dated June 29, 1965 of the State's Appellate Division, 2nd Department; and cannot, it is submitted, refer to the abortive attempts to cure or cover that judgment, subsequent to its entry, without its prior vacature.

Applicant, surprised by the Chief Judge's Opinion, of February 2, 1976, had reasonably relied, exclusively, upon the facial insufficienty of the said judgment, and the now conceded unconstitutionality of the "procedures" which had produced that "judgment". On its face, correspondingly it lacked essential recitals of due process, as prescribed by Section 5011, of the State's Civil Practice Law and Rules.

Applicant then moved to have a formal, sworn hearing, to include a confrontation with the findings of the Chief Judge's private "Investigation" of the "entire record" (16 months). However, by a second Memorandum Opinion, that motion was treated only as an accepted "reargument". The Opinion (March 19, 1976) limited its "envisionment" to that (2nd paragraph).

Applicant, by said second motion, was merely seeking that formal evidentuary hearing, which would have followed, of course, upon the Chief Judge's normal issuance under his Rule 5(d) of his Order to Show Cause, with no private "investigation", and unreported findings, allowed to intercept.

Contrary to the March 19, 1976 Memorandum of the Chief Judge, applicant, had urged sworn hearing at once by memorandum of January 16, 1976 and again by letter of February 4, 1976 ( ).

Such "investigation" ex parte, is not the true function of a judicial officer. That activity, out of court, has often been held outside judicial bounds. E.g., (Richardson v. Scudder, 247 N.Y. 401; N.Y. Constitution, Article 6, Sec. 20 ( ).

In any event, the Chief Judge was at once (A-1c) apprised of an earlier three-year "investigation" by the District Court in the Eastern District of New York.

Such new, repetitious investigation is indeed a justice denial by sheer delay.

It becomes even more prejudicial, when the Judge, returning to his function, deals selectively with the "record", omitting many portions, which the applicant would have submitted, and where necessary, would have offered sworn testimony in support. The entire original record "examined" by the Judge is permeated with evidence of retaliatory conduct by the

members of the Court, which issued the subject judgment; yet the second Opinion of the Chief Judge refers to applicant's said claim, as merely "conclusory" "without support in the record". Appellant submits that this square contradiction alone would warrant the sworn hearing, requested which the Opinion seemingly could not "envisage". (A-9, 2nd ¶).

Applicant also showed, by his Memorandum, submitted immediately after, and "in connection with" that unilateral argument, tolerated on January 16, 1976 (A-4, 23) as it were, the need for taking testimony. E.g., that the "record", which the "investigation" had to include, established original "infirmity of proof" ofall seven recited charges of misconduct, provided for, by Court Rule 5 d(2), (p 1, A-6 Footnote).

Applicant's immediate Memorandum of January 16, 1976 made clear the need to take sworn proof, and his February 4, 1976 letter, upon applicant's surprise discovery of the direction that the Chief Judge's Opinion No. 1 had taken, - bearing in mind, that the initial submission of applicant had been confined to the face of

the judgment of disbarment and its producing antecedents, that the judgment was the sole and single predicate, recited in and by the Chief Judge's automatic order of disbarment. (A-1).

Both Opinions refer to, and draw claimed strength from the Judge's private "examination" of the record; little is, thereof, however, presented, where controversy was probable. Certainly, we submit such a judicial presentation must be here refused, especially in the clear conceded presence of his denials of the protections of the constitutional guaranties, to the respondent-attorney.

The findings of unconstitutionality, were only confirmatory of the Report's conclusions and recommendations of the Prosecutor, in the United States District Court of the Eastern District of New York (65 M 811), of the United States Attorney, Joseph P. Hoey, filed with the Chief Judge of that Court in 1968. His reported (A3;) conclusion that the constitutionally invalid judgment of June 29, 1965, ipso facto, could not remain or be the base support of any further court proceedings (1965-8) in attempted correction thereof; and

that all subsequent state court proceedings had to fall with such final judgment as their base, upon which his Order to Show Cause exclusively rested, (as in the instant case of the automatic order of disbarment in this Court of September 25, 1974). However, the Opinion refers to our claim of that facially void judgment as of a mere defect of "form." (p. 12) (A-6 up) (Footnote 17)

When applicant was surprisingly confronted with the Chief Judge's first Opinion's "rationale" for, and allowing subsequent possibility of curing that nil judgment, applicant came forward with two Supreme Court cases, amongst other authorities, which, we submit, absolutely barred the further "rationale" of the second Opinion in its further salvaging endeavor, referring selectively (A-9) to only one of the two specific proffered cases in bar; passing in silence over the other (Fuentes v. Sheiry, 407 U.S. 67 (1972); Armstrong v. Manzo, 380 U.S. 545). (A-8

May we resepctfully refer this Court to applicant's letter-MEMORANDUM of Law of March 5, 1976 bodily and verbatim, (48), having in its entirety a most relevant present force, and with which this MAIN BRIEF of appellant may well close.

We refer this Court to the "Conclusions" at the end of our Memorandum of January 16, 1976, submitted to the Chief Judge. (A-4).

POINT II

APPELLANT IN THE LIGHT OF THE CHIEF JUDGE'S BASIC AND DECISIVE CONDEMNATION OF THE STATE JUDGMENT OF DISBARMENT, AND IN THE LIGHT OF THE FOREGOING STATEMENT OF FACTS, SHOULD NOT ALLOW HIMSELF TO BE DIVERTED NOW BY THE NUMEROUS COMMENTS, VIEWS AND SIGNIFICANT OMISSIONS OF THE TWO OPINIONS.

The Chief Judge's private "examination"(p.A-6) and "investigation" (A-23;A-6) of the "entire" State (and Federal Eastern District Court records) it seems, would make it incumbent, that those records confrontingly be made a part of this appeal, normally, instead of his selective footnote uses, thereof.

However, appellant would reserve that production for a sworn hearing, if that were necessary; for, till now, appellant has been relying sufficiently, we submit, upon the face of the state disbarment judgment and those unconstitutional antecedents, which produced it. For, the Chief Judge's disbarment order of September 25, 1974, exclusively rests on it, as recited thereon. Until 1974, all prosecution agencies had also felt estopped thereby and all prosecution

seemed abandoned. For, actually, an outside ulterior imposition upon the Chief Judge, nine years later, AFOM, induced him to act so abruptly. (See p. 2, AFF. - MEMO A-3).

As an egregious instance of such selective use, the Opinion repeatedly declares from the state "records", that the appellant "failed to deny" (p.v., p.2, A-6 Op.) the seven charges, therein set out at length. The Opinion withholds the actual "answer", first filed in the Appellate Division, in form of eleven opposing grounds "in bar" and demurrer as basis of a motion which followed, to dismiss immediately the Petition for the insufficiency in law of each of the charges. Those grounds actually included three equivalent affirmative defenses as well, in support of the obviously implied general denial. Sections 3211, 3212 of the State's Civil Practice Law and Procedure, and Article 4 (Section 401 el seq.) thereof, governing special proceedings, provide, that if, and when, the motion for dismissal is denied, the respondent then has opportunity to serve answer of ten more days after service of notice of entry of the order of denial. That opportunity to answer was abruptly cut off by

citing of judgment, final. The Opinion omits all this, and, also, a copy of those eleven grounds, to counter-balance the full recital of the seven charges, in fairness. (A-7, p 3)

The Judge's citation of the "Severino" case is one of the absence of all intention to oppose, by that respondent, the "specific" charges. (A-9)

The Opinion also omits this Respondent's detailed answers to each of the charges on the merits, in complete denial, contained in extenso in the Main Brief, in the New York Court of Appeals (June 1966), part of the State records examined in their entirety, by the Chief Judge.

CONCLUSION

THE ORDER OF THE CHIEF JUDGE, DATED SEPTEMBER 25, 1974, DISBARRING APPELLANT IN THE U. S. DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK, SHOULD BE VACATED, IN ITS RECITED SINGLE RELIANCE UPON AN OBSOLETE JUDGMENT.

Respectfully submitted,

WILLIAM R. KLEIN
Appellant pro se.

AFFIDAVIT OF SERVICE

Re: 76-6072
Klein v. Edelstein

STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer , being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Appellant .

That on the 24th day of June , 1976, I served the within Appendix & Brief in the matter of W. R. Klein v. David N. Edelstein,

upon David N. Edelstein, Chief Judge, United States District Court, Foley Square, 21st & Floor, New York, New York

& one (1) Appendix

by depositing two (2) true copies of the same securely enclosed in a post-paid wrapper, in an official depository maintained by the United States Government.

Muriel Mayer
Muriel Mayer

Sworn to and subscribed before me this 24th day of June 1976.

Lorraine Leotta
A Notary Public of the State of New Jersey.

LORRAINE LEOTTA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 13, 1977